

Minutes of the Board of Adjustment STUDY SESSION October 30, 2024

Minutes of the Study Session of the Board of Adjustment, of the City of Tempe, which was held in Council Chambers
31 East Fifth Street, Tempe, Arizona

Present:

Staff:

Chair Kevin Morrow	Jeff Tamulevich, Community Development Director
Vice Chair Kaelee Palmer	Ryan Levesque, Deputy Director Comm Dev
Board Member Michael McCaffrey	Drew Yocom, Comm Enhancement Deputy Director
Board Member Raun Keagy	Clarence Matherson, Deputy City Attorney
Board Member Mary Foy	Joanna Barry, Administrative Assistant II
Board Member Sean McCarley	
Board Member Brett Seigal	

Meeting convened at 5:40 p.m. and was called to order by Chair Morrow.

1. Review of October 30, 2024, Agenda.

Chair Morrow called for any questions from the Board. No questions from the Board.

Chair Morrow asked Diana in reference on the previous meeting minutes about the attached garage on the residential house. Part of that discussion the Board started veering off a little from what the parameters we are supposing to be looking at. Can we have staff walk us through what we are supposed to be considering when it comes to variances.

Ms. Diana Kaminski reminded Board members that anything said at the meeting is part of the public record. When reviewing requests, decisions need to be made based on the approval criteria follows:

1. That special circumstances are applicable to the property, including its size, shape, topography, and location.
2. Strict application of this code would deprive property of privileges enjoyed by other properties of the same classification in the same zoning district.
3. The judgment of authorized should not constitute a grant of special privileges inconsistent with the limitations on other properties within the vicinity in which such property is located.
4. A variance may not be granted if the special circumstances applicable to the property are self-imposed by the property owner.

Applicants must meet all 4 criteria.

Chair Morrow noted that the building in the case from the last hearing had already been built, but that, since it already existed is not one of the criteria. Perhaps the fact the building had a prior variance might go towards the self-imposed. Ms. Kaminski stated that each site would have special considerations depending on the circumstances. The idea that because something has been built is a justification for granting is not one of the criteria.

Vice Chair Morrow asked for a motion to adjourn the Study Session.

Motion by Vice Chair Palmer to close the Study Session; second by Board Member Keagy. Motion passed on **7-0** vote.

Ayes: Chair Morrow, Vice Chair Palmer, Board Members Siegal, Keagy, McCaffrey and McCarley

Nays: None

Abstain: None

Absent: Board Member Gans

The study session adjourned at 5:44 p.m.

Prepared by: Jennifer Daniels, Administrative Assistant II

Reviewed by: Diana Kaminski, Principal Planner



Minutes of the Board of Adjustment REGULAR MEETING October 30, 2024

Minutes of the Regular Meeting of the Board of Adjustment, of the City of Tempe, which was held in Council Chambers
31 East Fifth Street, Tempe, Arizona

Present:

Staff:

Chair Kevin Morrow	Jeff Tamulevich, Community Development Director
Vice Chair Kaelee Palmer	Ryan Levesque, Deputy Director Comm Dev
Board Member Michael McCaffrey	Drew Yocom, Comm Enhancement Deputy Director
Board Member Raun Keagy	Mike Baxley, Deputy Director Bldg/Eng/Permit
Board Member Mary Foy	Commander Kim Hale, Police Department
Board Member Sean McCarley	Joshua Price, Sales Tax & License
Board Member Brett Seigal	Diana Kaminski, Comm Dev Principal Planner
	Chris Jasper, Comm Dev Senior Planner
	Clarence Matherson, Deputy City Attorney
	Joanna Barry, Administrative Assistant II
	Jack Scofield, Code Enforcement Manager
	Matt Mansfield, Assistant City Attorney

Meeting convened at 6:00 p.m. and was called to order by Chair Morrow.

1) Voting of the Meeting Minutes:

Study Session & Formal Meeting Minutes from September 25, 2024.

Motion by Vice Chair Palmer to approve Meeting Minutes from Study Session and Regular Meeting September 25, 2024; second by Board Member Keagy. Motion passed on **7-0** vote.

Ayes: Chair Morrow, Vice Chair Palmer, Board Members McCaffrey, Keagy, Foy, McCarley and Siegal

Nays: None

Abstain: None

Absent: Board Member Gans

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- 2) Request a variance to reduce the use separation requirement between a tobacco retailer and a public school from 1,320 feet to 250 feet to **EXHALE SOCIETY, INC.**, located at 35 East Broadway Road. The applicant is Rose Law Group. **(PL240244)**

Applicant Presentation:

Mr. Alex Terhaar owner of Exhale Society, Inc. gave a presentation. After we opened as a private non-profit member club, we were cited in February by the city of Tempe for operating too close to a high school. No use permit is required in the city of Tempe for this type of business. There was a court ruling after we were cited for being a

tobacco retailer stating that we are not a tobacco retailer. We do not sell tobacco or allow it on the premises. The city of Tempe is stating that we need to obtain a license and become a tobacco retailer to continue operating. The city sent a letter in February stating that people can not consume cannabis within the club. There are no rules for cannabis to be consumed any distance from a high school. Cannabis is not related to tobacco. The city should make laws on cannabis consumption lounges and where they can be but unfortunately, they do not have any right now. We have had 1 emergency call since we opened. Someone had a bloody nose and passed out. We called 911. We are next to Mills Modern Social and CVS. Behind Mills Modern Social is the American Legion. The American Legion is a private members club that allows tobacco smoking and alcohol and does not have a Use Permit for tobacco. Exhale Society has a security system in place. You cannot get into the club until we verify you are over 21 years of age. You also must be a member and verify your membership. If we received the variance, we would be the first tobacco less tobacco retailer in the city of Tempe.

Staff Presentation:

Mr. Chris Jasper, Senior Planner gave a presentation. The applicant read the definition of a tobacco retailer (ZDC Section 7-121). A tobacco retailer includes "smoking establishments". The definition of a smoking establishment (ZDC Section 7-120) includes "or other substances emitting smoke". Based on the information that was available to staff regarding the use classification for this site it did fall under the preview under the definition of a smoking establishment which meant that it also fell under the definition of a tobacco retailer.

Chair Morrow asked if the tobacco retailer smoking establishments provisions were added more than 10 years ago, during a period when marijuana was not legal? There were probably no other types of smoking going on lawfully. Mr. Jasper stated that the use separation requirements for tobacco retailers and in general were established in 2007. The code text was adopted in 2007.

Chair Morrow asked, is there a provision in the zoning code for marijuana dispensaries? Mr. Jasper stated our code has language related to marijuana establishments. Which have a specific definition dispensaries and establishments. Chair Morrow asked, does that include cannabis smoking establishments? Mr. Jasper stated that marijuana establishments is for retail activities only. Private clubs are a separate entity.

Board Member Siegal stated, I am looking at Section 3-426 of the Tempe City Code. It seems to include restrictions on development within 1500 feet of a charter school or public school. Why wasn't the denial based on the marijuana code versus the tobacco code? Mr. Jasper stated private clubs, as the applicant noted are permitted. Assuming that they are non-profit entities, that they have established bylaws, identifying their membership, operations, etc. Such clubs are permitted, and smoking is permitted in the clubs, but they fall under the smoking establishments category. Mr. Ryan Levesque, Deputy Director Community Development clarified the definitions and land use regulations for marijuana establishments or medical marijuana dispensaries. Those provisions are set up specially for retailing only. Those dispensaries are allowed to dispense and sell the product. It is set up specifically for that process. There is another category, cultivating. Which is a marijuana establishment that grows the plants. It does not include the act of smoking in any of those specific environments.

Mr. Jasper covered the 4-part criteria that must be met for a variance to be approved. Staff believes the criteria's have not been met. The American Legion operation began before the use separation requirements were in place. We would consider it an existing non-conforming use. There are other sites around the city that would meet use separation requirements, sites that would be potentially eligible to host a tobacco retailer or smoking establishment. Mr. Jasper showed a map and indicated that the current site is within ¼ mile of 3 schools.

Mr. Drew Yocom, Deputy Director Community Enhancement gave a presentation on the ongoing code compliance case with Exhale Society. The code compliance case was initiated in the beginning of this year because the City of Tempe received a public complaint about an unpermitted tobacco retailer. This complaint came from a previous business owner that tried to open a tobacco retail shop in the shopping center at 35 East Broadway but was told at the time they do not meet separation requirements. After receiving this information, it was determined Exhale Society was operating a smoking establishment without proper use permits. We immediately notified them in February of this year to cease all legal business activity unless a use permit could be obtained. Over the last 8 months city staff has tried to educate Exhale Society on how to come into compliance. 4 separate violation notices identifying the illegal activity were delivered to the owners of the business and their representing attorneys in February, March, May and

June of this year. 4 additional violation notices were delivered to the property owner identify the violations on site. 5 conversations over the phone with Community Development staff have taken place since February clearly identifying the illegal business activity. Additional conversations were held with the city attorney's office. At this time 2 citations have been issued to the business owner and property owner for illegally operating a tobacco retailer without a use permit. Exhale Society continued to host public events on a regular basis and operate illegally. Exhale Society has also been found engaging in other activities without the required permits or licenses related to their business use. Numerous divisions across the city have opened independent investigations to address these ongoing violations. Some of these violations, from Code Compliance include not only the tobacco establishment without a use permit but also the continual hosting of live entertainment on a regular basis without a use permit. From Building and Safety, unpermitted interior modification spanning multiple suites without a building permit, egress issues in an emergency, concerns with their certificate of occupancy related to the smoking establishment use, and unapproved ventilation systems that have not be reviewed by Building and Safety. From the Tempe Fire Department, concerns with the fire suppression system, doors and egress concerns during an emergency. From Tax and License, we have identified activities requiring approvals or licensing. Including BINGO and gambling nights without a proper state license. Arcade games without an appropriate license documentation. Mostly importantly Exhale Society allows the consumption of liquor onsite without an approved liquor license. From the Tempe Police Department, we have health and safety concerns for the local community related to marijuana and alcohol consumption due to the business' location next to schools.

Mr. Clarence Matherson, Deputy City Attorney stated that he wanted to remind the board that we are here on an application from the applicant on a variance. The board should be looking at the 4 criteria. Those are the only matters the board should be considering at this time.

Commander Kim Hale, Tempe Police Department gave a presentation. In the same plaza at Exhale Society there is a bar that the city has been working with in dealing with fake id's. We know that the plaza has frequent use of underage people. One of the things said by the owner of Exhale Society was that it was invitation only. We have used undercover officers to check out how they operate. There was no invitation or referral. It was \$20 to get in. Inside the club they noticed there were vendors dispensing samples of marijuana. No one is checking to see how much anyone is dispensing or sharing. The detectives had tobacco products with them so they could smoke something and fit in at the club. People can bring their own alcohol in and drink inside the club. Those are concerns we have on how it is being managed and what is going on inside the club. I called the Department of Health Services and asked how the marijuana can be transported or distributed. If you distribute, you must log how much you are dispensing and who you are dispensing to. There are concerns of operating outside of the marijuana laws.

Chair Morrow asked staff about the court judgment that may have taken place earlier. Mr. Matherson stated the items related to the court judgement are not part of tonight's decision. We are only looking at the 4 criteria under the variance section. If the applicant or the city want to deal with the court decision there is a different avenue for that.

Vice Chair Palmer asked, did the applicant ever request a formal use interpretation from staff in writing? Mr. Jasper stated no. We have a provision zoning administrators' interpretation that is a formal process to get a use definition/classification determination on city letterhead. We do not have such application processed related to this site. Mr. Levesque stated, we did meet with attorney representatives. They explained their opinion and classification of the business and we provided our information and explanation of what category the business falls under. Vice Chair Palmer asked, I assume this is after they opened and received violations? Mr. Levesque stated it was during the process of receiving violations.

Board Member Keagy asked if there is a certificate of occupancy? Mr. Mike Baxley, Deputy Director Building and Safety stated there is not an active certificate of occupancy. The use they are currently using is not what was set up in the original certificate of occupancy. Board Member Keagy asked if it was possible for a land use to be both a smoking establishment and a private club? Mr. Jasper stated yes. We have a similar use; the business is called High Maintenance located on Mill Avenue. It operates as a tobacco retailer and as a private club.

Public Comment:

Ms. Avery Herendeen of Scottsdale, an undergraduate student at ASU and a member of Tempe Coalition, an organization working to reduce the use of underage drinking and drug use in youth and young adults. Ms. Herendeen

does not support the variance because it puts our youth in harms way. It is extremely problematic considering the location and proximity of the school. Allowing this business to be there is creating an environment of normalcy and acceptance of marijuana use in front of our teens. Acceptance of this business will have a direct negative impact of our Tempe youth and young adults.

Mr. Bryson Zolnick of Mesa. Mr. Zolnick stated that he has dj'd for Exhale Society many times. A lot of the concerns the city has is with the proximity to the youth and how they are allowing people in. I have never seen an establishment take it so seriously to verify everyone is 21 plus to get in. I think we have a good opportunity on how to navigate this, these are the right people to figure it out with.

Mr. Colin Rice of Phoenix. I am a member at Exhale Society. I want to thank you for what they have done for people like me, someone who has been smoking cannabis since fifteen years old. I've been a long time member of the club and been with them through this process. It is a safe place with multiple layers of security to deter youth cannabis use. Youth cannabis use is on the rise, but there has to be a solution. I don't think the high school is a situation, we need to have legislation that makes sense.

Mr. Edward Campos of Coolidge. Exhale Society is a good place. There is a bar next door that was allowed to go in, I don't understand that. I have my medical card and it is a safe place to go and smoke. You see social engagement there. The laws were created to point out when we are doing a bad job.

Applicant Response:

Mr. Terhaar stated that he did ask for the zoning interpretation and was told it is very clear we are a tobacco retailer. We are going through the process to get the certificate of occupancy. We were unaware that the suite was split before we took it over. We are 21 plus. The other tobacco retailer mentioned is 18 plus. Nobody has been in our club without signing a membership agreement and an invitation. It is required we see id and scan it into our computer system. If they did a sting operation, they received an invitation and signed a membership agreement. They stated the American Legion was there before, so they did not need a variance. Wouldn't they need a use permit to be a tobacco retailer? Under the tobacco retailer there is no cannabis consumption or mention of cannabis anywhere in there. It was written before cannabis was legalized. The judge ruled we are a private members club. We do not have open citations for use permits. There are no laws against cannabis consumption.

Staff Response:

Mr. Jasper stated there is a use permit in place for the American Legion. It is the applicant's responsibility to demonstrate that it meets all 4 of the 4-part components of the variance test. Based on the information they provided staff's opinion is that they have not demonstrated compliance with any of the 4 parts. The land use question is not an item that is to be determined by the Board of Adjustment through the variance process. That is a separate process. We are looking at the objective technical requirements for this site for a tobacco retailer.

Commission Discussion:

Board Member Keagy stated he appreciates the information given tonight given both the pros and cons of marijuana use as well as how the establishment operates and the steps they take to contain the use. The fact remains that this establishment is classified by the city as a smoking establishment and is subject to the separation requirement. In my opinion none of the criteria have been met and therefore I will not be supporting the request.

Chair Morrow stated that he does not know if it matters to the board that they are a tobacco retailer. If they are not a tobacco retailer the question becomes irrelevant. It is just the 4-part criteria.

Motion by Board Member Keagy to deny the request for a variance to reduce the use separation requirement between a tobacco retailer and a public school from 1,320 feet to 250 feet for **EXHALE SOCIETY, INC.**, located at 35 East Broadway Road; second by Vice Chair Palmer. Motion passed on **7-0** vote.

Ayes: Chair Morrow, Vice Chair Palmer, Board Members McCaffrey, Keagy, Foy, McCarley and Siegal

Nays: None

Abstain: None

Absent: Board Member Gans

3) **Chair/Staff Announcements**

Ms. Diana Kaminski let the board know there is 1 item for the November 20th Board of Adjustment Meeting.

4) **Adjourn**

Motion by Board Member Siegal to adjourn meeting; second by Board Member McCarley. Motion passed on **7-0** vote.

Ayes: Chair Morrow, Vice Chair Palmer, Board Members McCaffrey, Keagy, Foy, McCarley and Siegal

Nays: None

Abstain: None

Absent: Board Member Gans

Hearing adjourned at 7:10PM

Prepared by: Jennifer Daniels, Administrative Assistant II

Reviewed by: Diana Kaminski, Principal Planner